No. 240

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

Local Union No. 189, Etc., AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *et al.*,

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR NATIONAL LIVESTOCK FEEDERS ASSOCIATION, NATIONAL LIVESTOCK PRODUCERS ASSOCIATION, RIVER MARKETS GROUP, AMERICAN STOCKYARDS ASSOCIATION AND CERTIFIED LIVESTOCK MARKETS ASSOCIATION AS *AMICI CURIAE*

ALLEN WHITFIELD
616 Insurance Exchange Building
Des Moines, Iowa
Attorney for National Livestock Feeders Association, National Livestock Producers Association, River Markets Group, American Stockyards Association, and Certified Livestock Markets Association.

Of Counsel:
WHITFIELD, MUSGRAVE, SELVY & KELLY
616 Insurance Exchange Building
Des Moines, Iowa

La Salle Street Press—Chicago 10

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MOTION BY NATIONAL LIVESTOCK FEEDERS ASSOCIATION, NATIONAL LIVESTOCK PRODUCERS ASSOCIATION, RIVER MARKETS GROUP, AMERICAN STOCKYARDS ASSOCIATION, AND CERTIFIED LIVESTOCK MARKETS ASSOCIATION TO FILE BRIEF AS *AMICI CURIAE*

The National Livestock Feeders Association, the National Livestock Producers Association, the River Markets Group, the American Stockyards Association, and the Certified Livestock Markets Association hereby respectfully move for leave to file a brief *amici curiae* in this case in support of the respondent. The consent of the attorneys for the respondent has been obtained. The consent of the attorneys for the petitioners was requested but refused.

The National Livestock Feeders Association is a voluntary non-profit trade association representing livestock

farmers and feeders located in the major livestock areas of the country who feed and finish livestock for sale as fresh meat. Since the major portion of the meat from the livestock its members produce is sold in fresh form, the National Livestock Feeders Association has a special interest in the marketing restriction in issue in this case.

The National Livestock Producers Association is an association of farmer owned livestock marketing co-operatives operating in over one hundred and thirty-five livestock markets. These livestock marketing co-operatives represent over 400,000 farmer and rancher livestock producers. Each co-operative is owned by the farmers and ranchers who patronize it.

The River Markets Group, a non-incorporated trade organization, comprises in membership the livestock exchanges of six of the largest terminal markets in the United States, namely, St. Louis, Omaha, Sioux City, Sioux Falls, St. Joseph and Kansas City. It represents in excess of nine-hundred livestock selling agents operating on these major public markets and selling over twenty-three million head of livestock in 1964.

The American Stockyards Association is a service organization to the livestock and meat industry. Its members are operators of major public markets and thus are an integral part of the livestock and meat industry and their welfare is dependent upon the free movement of meat in the product market.

The Certified Livestock Markets Association is a business trade association of in excess of eight hundred livestock market businesses operating in over forty states. These livestock market businesses sell consigned livestock for customers and perform market services as public stockyards and market agencies as defined under the Packer and Stockyards Act (42 Stat. 159, 7 U.S.C. 181 et seq.).

Each of the movants is adversely affected by the market operating hours restraint in issue. The restriction prevents

fresh meat from being offered for sale in the Chicago area during twenty-five per cent of the hours when processed meats and other substitute products for fresh meat are being offered for sale. This is a severe handicap upon the members of the movants in the marketing of their products because it tends to reduce the potential amount of sales for fresh meat in one of the largest consuming centers for meat in the nation and to induce purchases of other products in lieu of fresh meat.

The Solicitor General's brief (pp. 49-50) seems to depart from the views expressed in prior opinions of this Court by urging that the interests of consumers and other interested third parties should not be weighed by the judiciary in cases of this nature. The movants disagree with the position taken by the Solicitor General. The interests of interested third parties such as the movants must be considered in order to prevent employers and employees from imposing unnecessary restraints upon the market for fresh meat and thus upon the livestock market.

For the foregoing reasons, the National Livestock Feeders Association, the National Livestock Producers Association, the River Markets Group, the American Stockyards Association, and the Certified Livestock Markets Association respectfully request permission to file the accompanying brief *amici curiae* limited to the issue of the scope of the labor exemption.

Respectfully submitted,

ALLEN WHITFIELD
Attorney for National Livestock Feeders Association, National Livestock Producers Association, River Markets Group, American Stockyards Association, and Certified Livestock Markets Association
616 Insurance Exchange Building
Des Moines, Iowa

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Interest of National Livestock Feeders Association, National Livestock Producers Association, River Markets Group, American Stockyards Association, and Certified Livestock Markets Association and Statement of Facts

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The National Livestock Feeders Association is a voluntary non-profit trade association representing cattle, sheep, and hog livestock farmers and feeders who feed and finish livestock for the slaughter market. Typically its members are individual entrepreneurs who purchase livestock in the

feedlot replacement market; feed the livestock themselves, and sell the finished livestock to meat packers and others; and typically, also, the livestock which they produce is slaughtered for sale to consumers, the major portion of which is sold as fresh meat. Accordingly, the members of National Livestock Feeders Association are particularly affected by the restriction in issue since one of its most immediate effects is to favor non-meat substitutes and processed meat products over fresh meat in sales in the Chicago area. Chicago, as the Court may judicially notice, is one of the largest single consuming markets in the nation for meat and other food products.

The National Livestock Producers Association is an association of farmer owned livestock marketing co-operatives operating in over one hundred and thirty-five livestock markets. These livestock marketing co-operatives represent over 400,000 farmer and rancher livestock producers. Each co-operative is owned by the farmers and ranchers who patronize it.

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Each of the *amici* is adversely affected by the market operating hours restraint in issue. The restriction prevents fresh meat from being offered for sale in the Chicago area during twenty-five per cent of the hours when processed meats and other substitute products for fresh meat are being offered for sale. This is a severe handicap upon the members of the *amici* in the marketing of their products because it tends to reduce the potential amount of sales for fresh meat in one of the largest consuming centers for meat in the nation and to induce purchases of other products in lieu of fresh meat.

This action seeking injunctive relief, a declaratory judgment and damages was brought by respondent Jewel Tea Co., Inc. ("Jewel"), in 1958 against petitioners, seven local unions of the Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO ("Meat Cutters"), Associated Food Retailers of Greater Chicago ("Associated") and Charles H. Bromann, Associated's secretary and treasurer.

Jewel alleged that the Meat Cutters, Associated and Bromann had combined and conspired to impose an unreasonable restraint of trade in violation of Section 1 of the Sherman Act upon all market operators in the Chicago Area. The means used to effectuate this unreasonable restraint of trade was a term in a collective bargaining contract which limited the operating hours of meat markets

from "9:00 A.M. to 6:00 P.M. Monday through Saturday, inclusive" (R. 51). Insofar as the interests of the members of these *amici* are concerned, it is important to note that the sale of all fresh meat was not prohibited after 6:00 P.M. Another clause in the market operating hours article provided that sliced bacon, delicatessen meats, frozen fresh poultry, fresh poultry, frozen packaged fish, smoked butts and frozen specialty meat items could be sold after market hours "in those stores in which the grocery departments remain open after 6:00 P.M." (R. 51-52).

These two provisions were found to have adverse and substantial effects upon competition in that they encourage the purchase of poultry and processed meat and various non-meat substitute food products such as eggs, canned meats, TV dinners and the like and discourage the sale of fresh meat by preventing retailers from offering it for sale at all hours when such other meat and food products are being offered for sale. Because of the effects of the market operating hours limitation on competition and because it lacked any redeeming feature, the Court of Appeals found the clause to be an unreasonable restraint of trade (R. 695). This Court denied certiorari on the issue of the reasonableness of the restraint.

The District Court, after trial without a jury, dismissed the complaint (R. 661-678), and the Court of Appeals reversed (R. 691-698).

ARGUMENT

Twenty years ago in a dispute similar to the one in issue, this Court noted:

> "... we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the others." *Allen Bradley Co.* v. *Local No. 3*, 325 U.S. 797, at 806 (1945).

This case is similar to *Allen Bradley* in that this Court is asked once again to determine whether the parties to a direct and unreasonable restraint are immunized from antitrust prosecution due to the labor exemption. The task is the same—to weigh the policies underlying both sets of laws and reconcile their policies in a way which will best serve the interest of the nation as a whole.

These *amici* believe that the facts in this case clearly prove that the market operating hours restriction provides, at most, only peripheral benefits to the unions which are readily obtainable by other means not involving damage to farmers, the public and others who are entitled to the benefit of free competition in the marketing of food products and that this Court should, therefore, hold the restriction to be unreasonable and outside the labor exemption. Although the restriction produces only peripheral benefits for union members, it is of great importance to the members of these *amici* because of their dependence upon a free market for their products and a market in which their products are treated equally with other meat and food products competing for the consumer food dollar.

It is clear that the hours when an individual works are within the ambit of the labor exemption; but this goal is

achieved by the working hours provision in the contract in issue (R. 49), and there is no necessity to go beyond that to also regulate the hours when fresh meat may be sold. The petitioners argue that it is necessary for them to limit the hours when fresh red meat may be sold in order to protect their hours of work. However, their argument is based on the proposition that "the subject of market operating hours intimately embraces every aspect of wages, hours and working conditions" (Pet. br., p. 58). In order to substantiate this proposition they argue that the restriction is needed to prevent butchers from working at night, that it is not possible to operate a self-service meat market without butchers on duty and that even if it were possible, Jewel would violate the collective bargaining contract by allowing non-butchers to perform some of the duties normally performed by butchers (Pet. br., pp. 63-73).

The reasons advanced by the unions are not sufficient to bring them within the scope of the labor exemption. If the butchers do not wish to work at night, Chicago area food retailers cannot force them to work. Employers can, however, endeavor to persuade the union members to work nights by offering them premium pay for night work or by making some other offer to induce the butchers to work nights. The feasibility of self-service operation without butchers on duty is a problem for management. If it is impossible for food retailers to sell meat without butchers on duty because they will not be able to adequately service their consumers, management is undoubtedly intelligent enough to make this decision on its own. Finally, it should not be assumed that reputable employers will knowingly violate the terms of the collective bargaining contract by allowing non-butchers to perform butchers' work. Moreover, these reasons should not be held to be sufficient to allow employers and employees to enter into agreements

which substantially restrict the free movement of a specific commodity thereby causing injury to its producers, sales agents, processors, and intermediate distributors, and gross inconvenience to consumers. This is particularly true in this case where alternative means are available which protect petitioners' interests without bringing great harm to other interested parties by prohibiting the sale of fresh meat.

This case is not like *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), *Milk Wagon Drivers* v. *Lake Valley Farm Products*, 311 U.S. 91 (1940), and *Fibreboard Paper Products Corp.* v. *NLRB*, 33 Law Week 4089, where ostensible restrictions upon competition were permitted in order to prevent employers from evading their commitments to observe union working conditions. In each of those cases the clause in controversy was needed to protect a real threat to a union's wages or existence. An analysis of those cases shows that if the employers had been permitted to engage in the conduct they desired, the union members would have been immediately injured in that their jobs would have been eliminated or union working standards adversely affected by utilizing non-union independent contractors. These dangers are not present in the circumstances of this case. There is no evidence that, if this clause is held to be illegal, Chicago meat retailers will hire non-union persons to perform butchers' work after 6:00 P.M. and it cannot be assumed that they will knowingly violate the requirements of the collective bargaining agreement in issue by permitting other employees to perform tasks normally performed by butchers during hours when butchers are not on duty. Therefore, the clause does not confer any material or direct benefit upon the petitioners sufficient to offset its gross detriment to Chicago area consumers, to producers of fresh meat and meat products and to others connected with the merchandising of fresh meat and meat products.

The Solicitor General places the limitation in controversy into a category of restraints which regulates "hours, work schedules, work assignments and other matters of direct concern to employees" and "also operate[s] as direct restrictions upon entry or competitive practices in a product market" (U.S. br., p. 37). Such restraints, he says, should be within the labor exemption. He argues that even though collective bargaining contracts encompass a multitude of subjects other than the traditional ones of wages, hours and working conditions, these contracts are within the labor exemption when they are the result of *bona fide* collective bargaining and are directly necessary to protect or promote some labor interest (U.S. br., pp. 37, 39). He contends the labor interest served by the market operating hours clause is that butchers do not wish to work nights and do not want to yield their work to other crafts (U.S. br., p. 48). In order to substantiate his contention, he reasons that if meat were sold after 6:00 P.M. without butchers on duty "there would be substantial *likelihood* that non-butchers would do butcher's work," "meat counters *might* have to be arranged or replenished," a "good customer *might* ask for special service" and Jewel would be *tempted* "to permit non-butchers to do these jobs" (emphasis supplied) (U.S. br., pp. 48-49). On the basis of these *speculations* he finds, without attempting to determine whether other means of achieving this alleged labor objective less restrictive in their effect upon competition are available, that the restraint is exempt from the antitrust laws due to the fact that it promotes a direct union benefit. He concludes his argument by telling consumers and interested injured third parties such as these *amici* that they should place their trust in the collective bargaining process and if their interests are prejudiced by collective bargaining they should look to Congress for relief.

The reasons set forth by the Solicitor General are the same as those relied upon by the petitioners. As previously noted, these reasons are insufficient to bring the petitioners within the purview of the labor exemption. If the labor exemption is to have any vitality, the requisite union benefit needed to exempt a restriction effectuated by collective bargaining from the antitrust laws must be based on more than mere speculation.

The facts in this case show that employers and employees are imposing serious restraints upon a competitive market. If employers and employees are going to be permitted to make such restraints effective by use of the collective bargaining process, the public interest requires that they should be permitted to do so only when other means of securing labor objectives have been exhausted and there is a remaining need for further action which can only be met by restraining trade.

Conclusion.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

ALLEN WHITFIELD
Attorney for National Livestock Feeders Association, National Livestock Producers Association, River Markets Group, American Stockyards Association, and Certified Livestock Markets Association

January 9, 1965